



## Kentucky Law Journal

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Volume 57 | Issue 1

Article 7

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1968

# Cases on Trusts by Austin W. Scott and Austin W. Scott, Jr.

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### Recommended Citation

Flickinger, W. Garrett (1968) "Cases on Trusts by Austin W. Scott and Austin W. Scott, Jr.," *Kentucky Law Journal*: Vol. 57 : Iss. 1 , Article 7.

Available at: <https://uknowledge.uky.edu/klj/vol57/iss1/7>

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# Book Reviews

CASES ON TRUSTS. By Austin W. Scott and Austin W. Scott, Jr.\* 5th ed.  
Boston: Little, Brown & Co., 1966. Pp. xxvii, 977.

In the good old days (according to the 5th Stanza of the Property Teacher's Lament<sup>1</sup>), the traditional law school curriculum contained a separate course in trust law, a course regarded as a must for the typical law student. Its meat was the opinions of the English Chancery Courts of the nineteenth century and it was designed to demonstrate the beauty of the genesis, development, and definition of a closed and perfect system of carefully drawn legal relationships (and incidentally to satisfy the more crass commercial aspect of preparing fledgling lawyers to handle the accumulated wealth of their future clients). *Sic transit gloria mundi!* Today the trust is a tax gimmick, the plaything of the estate planner, and its position as an independent offering is rapidly approaching the status of the Dodo. As in all such cases, however, there are a few conservationists still fighting to preserve the ancient form in all its pristine glory. The Messrs. Scott, *pere et fils*, must certainly be counted among the forefront of those gallant men. Nine hundred and seventy-seven pages of cases and text devoted almost solely to the proper development, care, and future of the trust relationship!

As a property teacher I applaud the courage of such protagonists, but sincerely question the relevancy of continuing the battle. In the complexities of today's modern legal world and with the burgeoning demands for space in a law school curriculum, trust law as a separate entity seems an anachronism. Unavailable, because of its necessary prerequisites until the second or even third year of law school, it appears to offer only another, even if more perfect, vehicle for analysis of legal reasoning. At a time when law students are clamoring for course offerings more relevant to modern society and technology, and when the use of the case method in third year courses appears to be under heavy attack, it does seem a bit impractical to spend so much time on the trust without regard to its present status. Certainly no practicing lawyer today would even approach the use of the trust device without careful regard to its tax consequences and its position within the overall estate plan of his client. It seems only logical then to attach trusts in

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\* The younger Professor Scott died prior to the publication of this casebook.

<sup>1</sup> An anonymous, unpublished work frequently heard at property law workshops and at meetings of curriculum committees.

tandem with its property cohort in estate planning—wills,<sup>2</sup> or as a part of an integrated package of wills, trusts and future interests.<sup>3</sup> The more recent casebooks (with the exception of the one reviewed here and Professor Bogert's new edition<sup>4</sup>) have accommodated the exigencies of the present day use of the trust by so amalgamating its content into such package deals—and with excellent results. As a result, this reviewer admits a feeling of futility on seeing the fresh appearance of a casebook devoted so completely and singly to trust law per se.

Since, however, there are still curricula permitting such singleness of purpose (or teachers who prefer to use separate casebooks for wills and for trusts even in combined offerings), it would seem appropriate to discuss both the format and the content of the casebook to determine its usefulness in such courses. In regard to the former, the editors have varied little, if indeed at all, from the previous (fourth) edition of the senior Professor Scott. This edition too then appears to be modeled along the lines followed in his superb treatise.<sup>5</sup> It is divided into twelve chapters of case opinion and textual comment together with six appendices containing the major statutes affecting the trust relationship. The first chapter offers some ancient decisions and textual statements tracing the development and history of trusts out of the fifteenth century use as a by-blow of the Statute of Uses. It then proceeds to a lengthy chapter containing cases and text comparing the trust to other relationships which bear some similarity to trusts—debts, bailments, charges, etc. Those who have used this edition or its predecessor in the classroom, as this reviewer has, quickly discover that most students are either confused or bored by the material in this chapter. Having no real conception as yet as to the essential nature of a trust, the student finds it difficult to understand the rationale for a review of other legal relationships through comparison with a legal relationship yet to be discovered. The material is useful and pertinent to the course, but seems out of place at this point. Most of the cases and materials could as easily, and perhaps more rationally, be included in the material dealing with the creation and the elements of the trust.

Following this introductory material, the editors adopted, in Chapters III and IV, a careful elucidation of the primary attributes of the

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<sup>2</sup> See, e.g., E. HALBACH & E. SCOLES, *PROBLEMS & MATERIALS ON DECEDENT'S ESTATES & TRUSTS* (1965); G. PALMER & R. WELLMAN, *CASES ON TRUST & SUCCESSION* (1958); R. POWELL, *CASES & MATERIALS ON TRUSTS & WILLS* (1960).

<sup>3</sup> See, e.g., A. GULLIVER, E. CLARK, L. LUSKY & A. MURPHY, *CASES ON GRATUITOUS TRANSFERS* (1967); J. RITCHIE, N. ALFORD & R. EFFLAND, *CASES ON DECEDENTS' ESTATES & TRUSTS* (2d ed. 1961); B. SPARKS, *CASES ON TRUSTS & ESTATES* (1965).

<sup>4</sup> G. BOGERT, *CASES ON THE LAW OF TRUSTS* (4th ed. 1967).

<sup>5</sup> A. SCOTT, SR., *THE LAW OF TRUSTS* 6 Vol. (2d ed. 1956).

trust—the requisities for its creation (intent, res, and purpose together with statutory formalities) and the elements necessary for its validity. The format here is clear, concise and logical, each case building upon its predecessor into a structure of both beauty and logic. This is followed in turn by three chapters covering the problems of: 1) the transfer of the beneficiary's interest (including the various spendthrift devices); 2) the administration of a trust; and 3) the termination and modification thereof. This portion of the casebook is also well-organized and all inclusive although the very nature of the problems of trust administration requires tremendous compression, a fact which suggests the advantage of including such material as part of a separate course on fiduciary administration. Chapter VIII is devoted to the special problems raised by the charitable trust (*cy pres et al.*). The next two chapters cover the issue of liability to and of third persons viz-a-viz the trust, a fascinating if somewhat esoteric area.

The editors then conclude with one chapter each on the resulting and constructive trust. It is in these last two chapters that this reviewer finds his primary objection to the format. The treatment of these last two so-called "trusts" is not only unnecessary but improper in a casebook on trusts. While some justification can be found for resulting trusts as implied-in-fact trusts, both of these legal entities are in reality equitable remedies designed primarily to prevent unjust enrichment. As such they are properly the subject matter of a course on remedies or restitution. No one denies that both have uses peculiarly within the confines of trust law, but such uses are more effectively examined in that particular context (*e.g.*, in the material on the Statute of Frauds). In fact the editors have so presented this facet of the two remedies and therefore devote these two chapters primarily to the device as an equitable remedy. Such inclusion seems either unnecessarily redundant or, as is particularly true of the chapter on constructive trusts, irrelevant.

The strongest criticism this reviewer can level, however, relates to the basic content of the material included in the casebook. In this regard there are three areas of serious objection: 1) the heavy dependence on nineteenth century opinions; 2) the overfrequent use of textual material directly related to a case; and 3) the excessive cutting of some case opinions.

It seems somewhat astonishing to find an American casebook published in 1966 containing a majority of cases decided prior to 1925 and derived to a large extent from the reports of the English Chancery Courts. No one would deny the existence of some historically important cases deciding important and novel issues in a style and manner which

has never been duplicated. Beyond such relatively few instances, however, the more recent cases offer the student a more pertinent fact situation in terms of both analysis and comprehension. The trust problems of a Victorian gentleman seem more appropriate to a Jane Austen novel than to a mid-twentieth century casebook. Furthermore the uses and meaning of language do change, and it seems an unnecessary hardship to force the student to translate in order to make an effective analysis. Experience may be the primary basis of the law, but it need not be the experience of one's grandfather.

Textual material, as an adjunct to case opinions, has become the *sine qua non* of most modern casebooks. When used in connection with fact problems, such material can be most helpful in permitting the student to interpolate rules and facts. Text can also be effectively employed to cover material not deemed sufficiently important for classroom analysis. The Messrs. Scott, however, have included text excerpts (primarily from the Restatement of Trusts, Second) after virtually every case, permitting such text to state the "rule" applicable to the preceding case. In view of the well-known propensity of students to seek such "rules" as the end product of legal education, this reviewer believes that resort to textual material of such a nature is both unwise and unnecessary. It is too much like printing the "pony" alongside the original. It would appear much more beneficial to require the student who needs such crutches to find them in the library by his own efforts.

The final area of complaint relates to the editing of the case opinions, particularly in the chapter on trust administration. Far too many of the opinions have been reduced to little more than the paragraph containing the actual decisions in terms of the "rule" of the case. The result of such editing, especially when combined with the text material previously mentioned, leaves the student with little or no scope for effective analysis. It also tends to reduce portions of the casebook to a series of rules, resulting in over-emphasis on content at the expense of reasoning. If law schools are concerned more with how the rules are evolved rather than with what the rules are, then such editing must be regarded as inappropriate, if not erroneous. If a case is significant enough to be included, it is significant enough to be included in full.

For all the criticism posited above, it would be a mistake to write off this casebook as a misguided effort. A good portion of the material objected to can be eliminated and the remaining portions employed effectively in a traditional course on trusts, or even together with a separate casebook on wills<sup>6</sup> in a combined course on wills and trusts.

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<sup>6</sup> See, e.g., W. LEACH, CASES AND MATERIALS ON WILLS (2d ed. 1960).

The format for the chapters on the elements and creation of the trust as well as those on the transfer of a beneficiary's interest, the termination and modification of a trust and the charitable trust, is skillfully drawn and appropriately contains the classic cases expositing the genesis and development of trust law. The material in the second chapter may be out of order but is by no means irrelevant. There are cases on trust administration that do provide excellent opportunity for analysis. The appendices contain the most current statutory answers to trust problems and can be most effectively integrated directly into the discussion of the case authorities. In short, then, this reviewer regards this casebook as somewhat limited for use in the current state of most curricula and containing some clearly objectionable features, but at the same time realizes the value of the scholarship represented as well as the historical merit of its approach. For teachers desiring a more positivist approach to trust law in its most traditional sense, this casebook could be regarded as virtually ideal, while for the more value-oriented or analytical-minded, the criticisms discussed previously may well be a serious drawback. In short, as Abe Lincoln once said to R. D. Owen, the spiritualist, "Well, for those who like that sort of thing, I should think that it is just about the sort of thing they would like" or as the old French saying goes, "*Chacun a son gout*".

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**THE TWO SWORDS: COMMENTARIES AND CASES IN RELIGION AND EDUCATION.** By Donald E. Boles. Ames, Iowa: The Iowa State University Press, 1967. Pp. xxiii, 402. \$10.95.

*The Two Swords*<sup>1</sup> is billed as a companion volume to this same author's earlier work, *The Bible, Religion and the Public Schools*.<sup>2</sup> It is essentially a specialized sourcebook covering the full range of situations in which educational administration comes into contact with the legal problems of church and state. The bulk of the book consists of judicial opinions, edited and abridged for the sake of spatial economy and comfortable reading. The connecting commentary is wholly descriptive, confined mainly to a listing of additional relevant cases, with capsule descriptions and some brief quotations. Professor

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<sup>1</sup> D. BOLES, *THE TWO SWORDS* (1937) [hereinafter cited as BOLES].

<sup>2</sup> D. BOLES, *THE BIBLE, RELIGION AND THE PUBLIC SCHOOLS* (2d ed. 1963).